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10/598,994

09/18/2006

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EXAMINER

PAGAN, JENINE MARIE

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/598,994
Filing Date: September 18, 2006
Appellant(s): PEUKER ET AL.

Peter L. Olson
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 08 December 2010 appealing from the Office action mailed 12 July 2010.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 55-58, 60-64, 73, 84 and 86-92 are rejected.

Claims 66-72, 74-83 and 85 are withdrawn.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

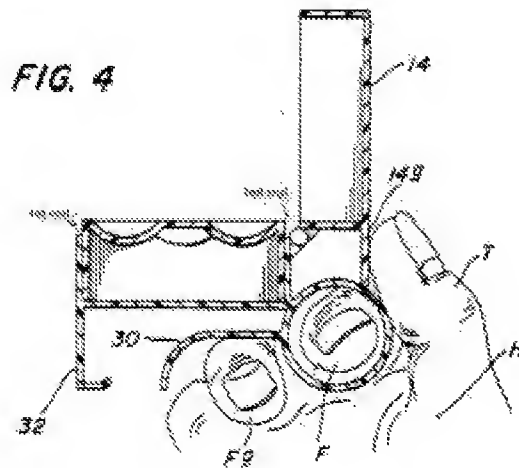
(8) Evidence Relied Upon

5,249,963	MCGARRIGLE	10-1993
6,343,695	PETRICK	2-2002
4,991,759	SCHARF	2-1991
5,660,273	DISCKO, JR.	8-1997

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 55-58, 61-64, 84, 86 and 90 are rejected under 35 U.S.C. 103(a) as being unpatentable over McGarrigle US 5,249,963 in view of Petrick et al. US 6,343,695 B1.



Claim 55: McGarrigle discloses a package assembly for storing and/or delivering substances such as dental substances, comprising at least one container 10 comprising a base 12 and a lid 14; and at least one hinge 16/18 connecting the base 12 and the lid 14; wherein the base 12 and the lid 14 comprise first 14a and second 26/30 levers, and the container 10 can be opened by moving the first and second levers 14a/26/30 towards each other, and wherein the container 10 contains at least one dental substance and is sealed with a breakable seal.

(When the lid is closed down on the base the container is sealed and when the lid is removed from the base the seal is broken.)

McGarrigle does not specifically disclose the seal is a tamper-evident seal.

However Petrick disclose a tamper-evident seal 33/36.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to apply a tamper-evident seal to the sides of the container of McGarrigle as taught by Petrick, since Petrick suggests at

Col 6:35-44 and Fig. 2A that such a modification would alert the user to the fact that the container has been previously opened.

Claim 56: McGarrigle discloses the hinge 16/18 is provided between the first 14a and second 26/30 lever.

Claim 57: McGarrigle discloses the container 10 is adapted for air-tight closing of the container with the seal.

(When the lid closes down on the base the container is closed preventing air from entering the container and is sealed as seen in Figure 3.)

Claim 58: McGarrigle discloses an end of the second lever 26/30 is bent in a direction away from the first lever 14a. (Fig. 3)

Claim 61: McGarrigle discloses the base 12 and/or the lid 14 are manufactured with an opening for filling the container 10 after manufacturing and for sealing with a seal.

(When the container is manufactured and filled with substance the lid closes down on the base and the container is sealed together as seen in Figure 3)

Claim 62: McGarrigle discloses the container 10 is sealed with a seal at a first end.

(When the lid closes down on the base the container is sealed together as seen in Figure 3)

Claim 63: McGarrigle discloses the seal is a part of the base.

Claim 64: McGarrigle discloses the seal is a part of the lid.

Claim 84: McGarrigle discloses the claimed invention as stated above in claim 55 except the package assembly exhibits an orange color, to filter blue light.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have the package to exhibit an orange color to filter blue light since it was known in the pharmaceutical art that it is common to provide the color to protect the substance inside of the container.

Claim 86: McGarrigle discloses the claimed invention as stated above in claim 55 except the lid and/or container comprise a self-cleaning or low energy surface.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to the lid and/or container comprise a self-cleaning or low energy surface, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. In re Leshin, 125 USPQ 416

Claim 90: McGarrigle discloses the substance comprises at least one of the materials selected from the group consisting of bonding materials.

Claims 60 and 91-92 are rejected under 35 U.S.C. 103(a) as being unpatentable over McGarrigle US 5,249,963 in view of Petrick et al. US 6,343,695 B1 and further in view of Scharf US 4,991,759.

Claim 60: McGarrigle/Petrick discloses the claimed invention as stated above but they do not specifically disclose the base, the lid and the hinge are integrally molded.

However Scharf discloses a base 16, a lid 14 and a hinge 20 are integrally molded. (Col 3:16-23)

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have the base, lid and hinge integrally molded, since it has been held that forming the cover, base and hinge in one piece an article which has formerly been formed in three pieces and put together involves only routine skill in the art. Howard v. Detroit Stove Works, 150 U.S. 164 (1993).

Claim 91: McGarrigle discloses the claimed invention as stated above in claim 55 but it does not specifically disclose the breakable seal can be broken by pushing the lid in a direction substantially towards the container.

However Scharf discloses a breakable seal can be broken by pushing the lid in a direction substantially towards the container.

When the tip of the cover 14 (at surface 38) reaches the top of the container 16, it creates a seal. That seal is later broken when the lid is pressed down further on to the container.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have the breakable seal be broken by pushing the lid in a direction substantially towards the container as taught

by Scharf, since Scharf suggests at Fig 2 and 3 that such a modification would provide an alternate way of breaking the sealed container.

Claim 92: Scharf further discloses an appendage 38 is created at the breakable seal during activation and provides a friction fit between the lid 14 and second end of the container 16 when the lid 14 is pushed onto the container 16. (Col 3:66-4:7)

Claim 73 is rejected under 35 U.S.C. 103(a) as being unpatentable over McGarrigle US 5,249,963 in view of Petrick et al. US 6,343,695 B1 and further in view of Discko, Jr. US 5,660,273.

Claim 73: McGarrigle/Petrick discloses the claimed invention as stated above but they do not specifically disclose the package comprises a disposable applicator.

However Discko discloses a package 30 comprising a disposable applicator 20.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have the package of McGarrigle include a disposable applicator as taught by Discko, since Discko states at column 3 line 50-60 that such a modification would allow the user to use the material such as bonding agents located inside of the container.

Claims 87 and 89 are rejected under 35 U.S.C. 103(a) as being unpatentable over McGarrigle US 5,249,963 in view of Petrick et al. US 6,343,695 B1.

Claim 87: McGarrigle discloses a method for providing dental substances, comprising the steps of providing a package assembly, comprising at least one container 10 comprising a base 12 and a lid 14 and at least one hinge 16/18 connecting the base 12 and the lid 14, wherein the base 12 and the lid 14 comprise first 14a and second levers 26/30, and wherein the container 10 can be opened by moving the first and second levers 14a/26/30 towards each other, and wherein the container 10 contains at least one dental substance and is sealed with a breakable seal, and opening the closed package assembly by pressing the two levers 14a/26/30 together.

(When the lid is closed down on the base the container is sealed and when the lid is removed from the base the seal is broken.)

McGarrigle does not specifically disclose the seal is a tamper-evident seal. However Petrick disclose a tamper-evident seal 33/36.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to apply a tamper-evident seal to the sides of the container of McGarrigle as taught by Petrick, since Petrick suggests at Col 6:35-44 and Fig. 2A that such a modification would alert the user to the fact that the container has been previously opened.

Claim 89: McGarrigle discloses a method of closing the container 10 by pressing the lid 14 onto the container 10.

Claim 88 is rejected under 35 U.S.C. 103(a) as being unpatentable over McGarrigle US 5,249,963 in view of Petrick et al. US 6,343,695 B1 and further in view of Scharf US 4,991,759.

Claim 88: McGarrigle/Petrick discloses the claimed invention as stated above but they do not specifically disclose pressing the lid in substantially the direction of the container for breaking the seal.

However Scharf discloses pressing the lid 14 in substantially the direction of the container 16 for breaking the seal.

When the tip of the cover 14 (at surface 38) reaches the top of the container 16, it creates a seal. That seal is later broken when the lid is pressed down further on to the container.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to have the breakable seal be broken by pushing the lid in a direction substantially towards the container as taught by Scharf, since Scharf suggests at Fig 2 and 3 that such a modification would provide an alternate way of breaking the sealed container.

(10) Response to Argument

Appellant argues independent claims 5 and 87 and dependent claims 56-58, 61-64, 84, 86 and 89-90 and the combination of McGarrigle in view of Petrick et al. The initial argument is that the combination would contradict the teachings of McGarrigle and destroy the functionality of Petrick. The Appellant argues that the

dispenser of McGarrigle is filled with dental material and used by an assistant therefore it would not be obvious to add a tamper-evident seal to the container as taught by Petrick. The Examiner respectfully disagrees.

McGarrigle teaches an overall package of a container to hold dental material to be used by an assistant, whether the material is pre-filled into the container prior to being received by the assistant or whether the assistant fills the container prior to being used, a tamper-evident seal would alert the assistant that the container has been opened since previously being filled. Due to the dental materials are used in a patient mouth it is important to know if the container has been tampered with or contaminated.

The Appellant argues that the materials contained in the depressions of the container of McGarrigle is capable of being spilled and would not require the tamper-evident seal taught by Petrick. The Examiner respectfully disagrees.

McGarrigle discloses a container having a lid and base capable of being sealed.

Although McGarrigle discloses that the depressions hold materials that can spill, they are also capable of holding other types of material that do not spill. The

types of material held in the depressions are considered to be intended use and

the depressions of McGarrigle are capable of holding various types of material

that would require a tamper-evident seal. A recitation of the intended use of the

claimed invention must result in a structural difference between the claimed

invention and the prior art in order to patentably distinguish the claimed invention

from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Appellant argues dependent claims 60, 88, 91 and 92 and the combination of McGarrigle in view of Petrick et al and further in view of Scharf US 4,991,759.

The second argument that the Appellant has is that Scharf does not teach a seal being breakable by pressing the lid into the container. The Examiner respectfully disagrees.

McGarrigle discloses a container that has a lid that fold over the base and a flange that extends out over the base to create a seal to the container. Scharf discloses a similar container that has a reversed format than that of McGarrigle. Scarf discloses a flange 38 that initially engages the base 16 at the top portion of the container and creates an initial seal between the lid 14 and the base 16. By pressing down on the cover further the flange 38 frictionally extends down into the container 16, breaking the initial seal and creating a new seal that ultimately closes the container.

Appellant argues dependent claim 73 and the combination of McGarrigle in view of Petrick et al and further in view of Discko, Jr.

The third argument that the Appellant has is that the reference of Discko does not remedy the deficiencies of McGarrigle, the Examiner respectfully disagrees.

Art Unit: 3728

Discko is referenced to teach that it was known in the art to provide a disposable applicator to a container package. It would be obvious to one having ordinary skill in the art to provide a disposable applicator to the container package of McGarrigle to apply dental materials to a patient.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Jenine M Pagan/
Examiner, Art Unit 3728

Conferees:

/Mickey Yu/
SPE, AU 3728

/Joseph J. Hail, III/
Supervisory Patent Examiner, Art Unit 3723